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No. 90-900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

BRIEF *AMICI CURIAE* OF THE NEW YORK STATE INTER-FAITH COMMISSION ON LANDMARKING OF RELIGIOUS PROPERTY, THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, THE QUEENS FEDERATION OF CHURCHES, THE NEW YORK STATE COUNCIL OF CHURCHES, THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE NATIONAL ASSOCIATION OF EVANGELICALS, THE NEW YORK BOARD OF RABBIS, DEPARTMENT OF CHURCH IN SOCIETY, DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST), AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE REFORMED CHURCH IN AMERICA AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Under the holding of *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990), whether a State may require a religious organization to expend its limited funds to support the secular, aesthetic interests of the State?

2. Under the holding of *Employment Division* v. *Smith*, whether a State may use a "neutral" law to dictate how a religious organization fulfills its religious mission whenever that religious organization owns property that is aesthetically pleasing to the State?

3. Whether a landmark's law that permits a State to favor one religion over another and scrutinize the manner in which a religious organization fulfills its religious mission violates the Establishment Clause of the First Amendment?

4. Whether a State possesses any "legitimate State interest" in the aesthetic qualities of property owned by a religious organization that would permit the State to force such an organization to maintain its property solely to preserve the State's aesthetic interest, at no cost to the State, without effecting a taking of the property?

5. Whether a State may freeze a religious organization's use of its property, regardless of whether that use continues to fulfill the religious mission of the religious organization, without effecting a taking of the property?

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INTRODUCTION

The New York State Interfaith Commission on Landmarking Religious Property, The Council of Churches of the City of New York, Inc., The Queens Federation of Churches, The New York State Council of Churches, The National Council of Churches of Christ in the U.S.A., The National Association of Evangelicals, The New York Board of Rabbis, Department of Church in Society, Division of Homeland Ministries, Christian Church (Disciples of Christ), Americans United for the Separation of Church and State, The Reformed Church in America and James E. Andrews As Stated Clerk Of The General Assembly Of The Presbyterian Church respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") filed by petitioner The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or the "Church").

As religious organizations[1], the *amici curiae* have a direct, fundamental interest in the dispute between St. Bartholomew's and the City of New York that is the subject of the decision issued by the Second Circuit on September 12, 1990 in this action.[2] In that decision, the Second Circuit erroneously determined that the holding of this Court in *Employment Division* v. *Smith*, 110 S. Ct. 1595 (1990) ("*Smith*"), granted the City of New York absolute power to require religious organizations to expend their limited funds to support the aesthetic interests of the City of New York over their religious beliefs whenever such support was required by a "neutral" law. The Second Circuit further misinterpreted the holding of *Smith* to empower the City of New York to use a

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1 The interests of the *amici curiae* are detailed in Exhibit A to this memorandum.

2 *The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church* v. *The City of New York, et al.*, 914 F.2d 348 (2d Cir. 1990).

"neutral" law to dictate how a religious organization fulfills its religious mission whenever the religious organization owns property that is subject to the application of the New York Landmarks Preservation Law (the "Landmarks Law").[3] Moreover, the Second Circuit ignored the gross entanglement in the affairs of religious organizations that results from the operation of the Landmarks Law. Finally, the Second Circuit mistakenly held that the State possesses a "legitimate State interest" in the aesthetic qualities of property owned by a religious organization and that as long as the Church is able to use its existing property to carry out its religious mission in any minimal fashion, the City of New York has not engaged in an unconstitutional taking of St. Bartholomew's property.

The breadth of the Second Circuit's errors threaten the religious liberty interests of the *amici curiae*. If not reviewed by this Court, the Second Circuit's interpretation of *Smith* threatens the ability of every religious organization that owns any property that a State deems to be aesthetically pleasing to carry out its religious mission without interference or supervision by that State. If left standing, the Second Circuit's decision permits any State to superimpose its aesthetic values—its secular spirituality—upon the religious values of any religious organization that owns property subject to a landmarks law and force that religious organization to expend its limited funds to support the State's interests in secular spirituality *before* it may spend any monies in support of its religious mission. The Second Circuit's decision further empowers any State to prefer and endorse the architectural achievements that emanated from past expressions of religion over the current missions of the religious organizations that own these properties. If left intact, the Second Circuit's decision permits the City of New York to freeze any architecturally significant property owned by religious organizations without any compensation to the religious organizations so long as the burdened property could be put to any minimal

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3 N.Y.C. Administrative Code, Ch. 8-A, Section 205-1.0 *et seq.* (1979) (revised Administrative Code, Ch. 3, Section 25-301 *et seq.* (1985)).

religious use. The *amici curiae* find such legal results profoundly disturbing and a shocking, unconstitutional expansion of the State's power over religious organizations.

No other civil regulatory scheme interferes so directly with the constitutional rights of religious organizations or burdens religious organizations so disproportionately as the landmarks laws enacted by various states. By providing the state with the opportunity to exert power over houses of worship, these laws represent a dangerous breach in the constitutional wall separating church and state.[4]

This constitutional debacle is not limited to actions taken by the City of New York. The Supreme Courts in the States of Massachusetts and Washington have recently overturned similar landmarking statutes in order to protect religious liberty interests. *See Society of Jesus of New England* v. *Boston Landmarks Commission*, 408 Mass. 38 (1990); *First Covenant Church* v. *City of Seattle*, 114 Wash. 2d 392, 787 P.2d 1352 (1990) (*en banc*), *petition for certiorari filed*, December 6, 1990, Docket No. 90-892.

For the reasons set forth below, and the reasons contained in the petition for a writ of certiorari submitted by St. Bartholomew's, the *amici curiae* respectfully request that this Court review and reverse the decision of the Second Circuit and that judgment be entered in favor of St. Bartholomew's.

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4 Unfortunately, it is a breach that the State has stepped through many times: church and synagogue buildings have been individually designated as landmarks in New York City at a rate forty-two times higher than the proportion of church and synagogue buildings to all buildings in New York City. N.J. L'Heureux, "Ministry vs. Mortar: A Landmark Conflict," reprinted in D. Kelley, ed., *Government Intervention in Religious Affairs, II* (Pilgrim Press N.Y. 1986), at 168.

REASONS FOR GRANTING THE WRIT

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT PROTECTS RELIGIOUS ORGANIZATIONS AGAINST THE INVOLUNTARY EXPENDITURE OF MONIES DESIGNED TO PROMOTE THE AESTHETIC INTERESTS OF THE STATE

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment or religion, or *prohibiting the free exercise thereof . . . .*" U.S. Const. Am I (emphasis added). The "exercise" of religion includes not only the right to believe and profess whatever religious doctrine one desires, but also the right to take actions that are "rooted in religious belief." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). This Court has observed that "belief and action cannot be neatly confined in logic-tight compartments." *Id.*, 406 U.S. at 220. Indeed, in the view of the *amici curiae*, since the State cannot regulate a person's thoughts, it is the right to act on religious beliefs that constitutes the most meaningful protection offered by the Free Exercise Clause of the First Amendment.

This Court has warned federal courts not to "dissect" religious beliefs to determine whether specific conduct truly involves the practice of religion because courts are "singularly ill-equipped" to resolve intrafaith differences or to interpret scripture. *Thomas* v. *Review Board*, 450 U.S. 707, 715-16 (1981). Rather, courts should merely determine whether the conduct in question is "rooted in religion." *Id.* at 713. *See also Holy Spirit Ass'n* v. *Tax Commission*, 55 N.Y.2d 512, 527-28, 450 N.Y.S.2d 292, 298, 435 N.E.2d 662, 668 (1981) ("It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is.") Therefore, every activity that advances the missional objectives of a reli-

gious organization is protected by the Free Exercise Clause of the First Amendment.[5]

In this case, however, the Second Circuit held that this protection is absolutely meaningless, according to its interpretation of *Smith*, whenever a State enacts a "neutral" law that prohibits or restricts the religious activities of a religious organization. 914 F.2d at 354. Rather, the Second Circuit held that a State law violates the Free Exercise Clause of the First Amendment only if there is "a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." 914 F.2d at 355. Thus, according to the Second Circuit, a State can enact any "neutral" law for any purpose whatsoever and, as long as one priest can still minister to one parishioner, the State has not violated the Free Exercise Clause of the First Amendment.

The holding of this Court in *Smith* cannot be interpreted as such a complete evisceration of the Free Exercise Clause's protection of religious conduct. In *Smith*, this Court upheld the right of Oregon to enact criminal penalties for the possession of the drug peyote, even if the peyote was used in a sacramental ceremony of the Native American Church. This Court refused to require Oregon to justify that law as fulfilling a "compelling government interest" for the following reasons:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is

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5 In this case, the District Court properly found that the actions of St. Bartholomew's Church to provide assistance to the homeless, Christian education and preschool programs constituted a part of the *religious mission* of St. Bartholomew's. 728 F. Supp. at 961.

> "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," . . .—contradicts both constitutional tradition and common sense.

110 S. Ct. at 1603 (citations omitted). In refusing to apply the "compelling government interest" test, however, this Court did not grant the States the license to regulate any conduct for any purpose, regardless of the impact on religious conduct.

Here, the purpose of the Landmarks Law is to preserve aesthetically appealing buildings. The Landmarks Law does not prohibit any "socially harmful conduct" in any meaningful sense of those words. Moreover, as applied to buildings owned by religious organizations, the purpose of the statute is illegitimate and offensive—no State should be permitted to promote the State's view of aesthetics at the expense of the religious mission of the religious organization that owns the property. In effect, the Second Circuit's decision permits the State to enforce the secular spiritual values embodied in aestheticism over the religious values of a particular religious organization.

Moreover, the interference of the Landmarks Law with the ability of a religious organization to fulfill its religious mission cannot be understated. First, the religious organization is required, under threat of criminal penalties, to expend whatever monies are necessary to maintain a landmarked building in its original condition irrespective of whether these expenditures may violate the religious beliefs of the organization by forcing the religious organization to maintain a civic landmark at the expense of its religious mission.

Second, once landmarked, the property of the religious organization may no longer be used to help fulfill the religious mission of the organization solely in accordance with the beliefs of the religious organization if the mission involves any alteration of the structure. Rather, any proposed changes in the structure of the building must be approved by the state and the proposed change may be rejected by the state purely on aesthetic grounds. The religious organization

then remains responsible for maintaining the building on aesthetic grounds, regardless of how obstructive such maintenance may be to the religious mission.

Finally, the religious organization may attempt to obtain "hardship" relief from the state by demonstrating that the failure to permit the proposed change would "prevent or seriously interfere" with the mission of the religious organization. *See Lutheran Church in America* v. *City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974). But, once again, it is the state that determines whether the mission of the religious organization requires the proposed changes in the landmarked building. Thus, rather than lighten the burden on the free exercise of religious beliefs, the hardship application process gives the state the power to minutely investigate and critique the religious organization's mission and the means used by the religious organization to attempt to fulfill that mission.

Moreover, the hardship application process does not permit the religious organization even to attempt to alter a landmarked property to serve a new use. *See* Section 207-8.0(a)(2). Even where the faith of a religious organization cries out for changes to be made, those pleas must be ignored by the state, and the religious organization forced to maintain the landmarked building in a manner contrary to its religious mission. For example, as a religious community ages, a religious organization could be prevented from altering a landmarked building from use as a pre-school to one more suitable to serving the needs of senior citizens.

Moreover, the facts presented to the District Court demonstrate that the Landmarks Law, as applied to St. Bartholomew's, constituted a particularly severe burden on the free exercise of religion by the Church. As a fundamental component of the exercise of its faith, St. Bartholomew's determined in 1983 that it should utilize a portion of its landmarked property in a new manner that would enable it to meet the needs of its missional programs. By replacing its Community House with a mixed-use office building, the

Church hoped to provide adequate facilities for its existing programs to aid the homeless and provide preschool children's education as well as to raise the monies necessary for essential repairs to the church building itself.

The City of New York responded to the attempt by St. Bartholomew's to exercise its faith in this manner by using the Landmarks Law to completely reject all proposals to construct the new building. At the hearing on its request for hardship relief, St. Bartholomew's Church presented evidence that its community outreach programs for the homeless and its Christian education and preschool programs were adversely affected by the Landmarks Law's grip on its property. These programs are a fundamental part of the Church's religious mission and are supported by the Episcopal Church and the New York Diocese. The Landmarks Law, however, has prevented St. Bartholomew's from utilizing its assets in the manner that it deems appropriate to provide a sufficient level of financial support for these programs.

This Court has recognized that religious organizations need funds to operate and that the use of religious property to produce income enables religious organizations to carry out their religious activities. In *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), the Court observed that "a religious organization needs funds to remain a going concern" and that a State may not make the exercise of a religious practice so costly as to deprive it of the resources necessary to its maintenance. 319 U.S. at 111-12. In *Murdock*, this Court invalidated a license tax on members of Jehovah's Witnesses who were engaged in the door-to-door distribution of religious literature. Recently, this Court commented that the unconstitutionality of the license tax struck down in *Murdock* stemmed from the fact that the tax "operated as a prior restraint on the exercise of religious liberty." *Jimmy Swaggart Ministries* v. *Bd of Equalization*, ____ U.S. ____, 110 S. Ct. 688, 694 (1990). Like the license tax struck down in *Murdock*, the Landmarks Law is a prior restraint upon the ability of St. Bartholomew's to carry on its religious mission.

Further, when a religious organization's use of its property, or revenues derived therefrom, will directly advance its charitable and religious purposes, the ownership interest in such property is an asset or resource to be used in the exercise of religious liberty. Thus, in determining whether a statute unconstitutionally burdens the free exercise of religion, the statute's impact on the religious organization's financial ability to carry out its mission cannot be ignored. The Second Circuit admitted that the Landmarks Law "drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs." 914 F.2d at 355. But the Second Circuit simply ignored this direct assault on the religious mission of the Church.

In addition to the direct financial impact on St. Bartholomew's, the Landmarks Law has interfered with the Church's free exercise of its religion in other ways. St. Bartholomew's determined that the Community House was an obsolete structure with an inadequate layout and insufficient space for its activities. The Landmarks Law, however, has prevented the Church from re-constructing the Community House so that the Church may fully carry out its missional programs.

The Landmarks Law has also forced St. Bartholomew's to continue expending substantial funds on the upkeep of a building that it has already determined should be replaced to enable the Church to fulfill its religious mission. Thus, the Landmarks Law has coerced St. Bartholomew's into expending resources in a manner that violates its religious mission.

Therefore, involuntary application of the Landmarks Law to buildings owned by religious organizations, including St. Bartholomew's, must be held to be an unconstitutional violation of the right to free exercise of religion. The Landmarks Law substantially burdens free exercise rights without serving any compelling government interest. For these reasons, this Court should grant the Church's petition for a writ of certiorari and reverse the decision of the Second Circuit.

INVOLUNTARY APPLICATION OF THE LANDMARKS LAW TO PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Where a law creates such a preference, the Court has applied a strict scrutiny standard, upholding the statute only if it is closely tailored to further a compelling state interest. *Id.* at 246.

The Landmarks Law demonstrably prefers certain denominations and religious beliefs over others. Thirty-one of the ninety-five landmarked religious structures in New York City are Episcopal. Because only structures of "special character" and more than thirty years old are subject to the Landmarks Law, more recently established faiths and religious organizations are free from even the threat of the burdens inherent in landmark designation. Thus, these other religious organizations may devote all their resources to the fulfillment of their religious mission while religious organizations such as the Episcopal Church are disproportionately burdened.

In addition, the buildings owned by religious organizations that have been designated as landmarks are the product of those organizations' religious beliefs, not some secular interest in fine design. The beliefs of religious organizations, however, often evolve and change over time, either in response to new conditions in the community or new interpretation of the religious organization's faith. Thus, over time, different faiths and different movements within a single faith will place greater or lesser importance on the construction of architecturally distinctive buildings.

By its very nature, the Landmarks Law permits the State to intervene in this religious debate and permanently tip the scales in favor of those who believe that their faith is best

fulfilled by the continued construction and maintenance of buildings with "special character". The Landmarks Law inherently binds a religious organization to the decision to exercise its faith by constructing an architecturally distinctive building—even if that decision was made seventy years ago and no longer fully and accurately reflects the faith of the religious organization.[6] Thus, to the extent that it is applied to buildings owned by religious organizations, the Landmarks Law inherently preserves one exercise of religion over any other. Therefore, the involuntary application of the Landmarks Law to buildings owned by religious organizations should be held to be a violation of the Establishment Clause of the First Amendment and the decision of the Second Circuit should be reversed.

The Establishment Clause of the First Amendment also prohibits excessive entanglement of government with religious organizations. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). In particular, the Supreme Court has consistently condemned "comprehensive, discriminating and continuing state surveillance" of religious institutions as violative of the Establishment Clause. *Id.*; *see Aguilar* v. *Felton*, 473 U.S. 402 (1985); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502-03 (1979).

The Landmarks Law, as applied to the request for hardship relief submitted by St. Bartholomew's Church, resulted in exactly the kind of intense government involvement in the internal affairs of the Church prohibited by the Establishment Clause. The Church's decisionmaking process, management, operations and religious mission were all subjected to public scrutiny and comment.

The District Court's decision underscores the entanglement of the State with St. Bartholomew's Church. In the course of reviewing the evidence presented by the Church in support of its application for hardship relief under the Landmarks Law,

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6 Ironically, for those religious organizations most interested in maintaining their separation from the state and their autonomy, the most rational reaction to the Landmarks Law is to construct buildings with no "special character" whatsoever.

the District Court criticized various aspects of the Church's planned new structure and made several suggestions as to how the Church should fulfill its religious mission within the confines of its existing finances and physical plant. For example, the District Court suggested that rather than constructing new facilities for feeding the homeless, the Church could use its auditorium or other dining facilities for that program. 728 F. Supp. at 969, n. 22. The District Court also suggested that the Church could make all necessary repairs to its existing buildings by invading its endowment for the most essential work first and spreading the remaining expenditures over a longer period of time. 728 F. Supp. at 971, n. 26. The District Court expressed disappointment in the Church's failure to accept an offer from a Landmarks' Commission witness to assist the Church in carrying out repairs and rehabilitation of the existing buildings, as volunteered by that witness in an attack on the Church's planned new structure. 728 F. Supp. at 971, n. 27.

The sum total of the dictates in the District Court's decision is that the State, not the Church, determines: (a) how the buildings should serve the religious mission of the Church; (b) how the Church should pay for renovation of the building and when repairs should be made; and (c) whom the Church should hire to assist it in making the repairs. Both the District Court and the Second Circuit described this gross entanglement in the affairs of the Church as merely the proper result of a limited "inquiry into church finances" and "architecture". 914 F.2d at 356, n. 4; 728 F. Supp. at 963. Thus, under the cover of a limited "inquiry", the State is given the power to control the internal affairs of the Church—a result that completely violates the autonomy of the Church and the bedrock principle of complete separation of church and state.

The application of the Landmarks Law to St. Bartholomew's Church has led to an intimate and continuing relationship between the Church and the City of New York. This Court has held that such a relationship is unacceptable. *Lemon* v. *Kurtzman*, 403 U.S. at 620-22. The goal of the

Establishment Clause is the "insulation and separation" of church and State from each other. *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970). As applied to St. Bartholomew's Church, the Landmarks Law violated this goal and the rights of the Church to be separate from the State and completely autonomous in the exercise of its religion. Therefore, the petition for a writ of certiorari should be granted and the decision of the Second Circuit should be reversed.

AS APPLIED TO ST. BARTHOLOMEW'S CHURCH, THE LANDMARKS LAW VIOLATED THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." This guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123 (1978) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). The Supreme Court has noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). Furthermore, "[i]t is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property . . . , so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner." *Keystone Assoc.* v. *Moerdler*, 19 N.Y.2d 78, 88, 224 N.E.2d 700, 703, 278 N.Y.S.2d 185, 189 (1966) (quoting *Forster* v. *Scott*, 136 N.Y. 577, 584 (1893)).

In *Penn Central*, this Court held that the Landmarks' Law did not effect an unconstitutional taking of the Grand Central Terminal because:

> Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the property. *More importantly*, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

438 U.S. at 136 (emphasis added).

The Second Circuit, however, held that the only test for determining whether the Landmarks Law has effected a taking of St. Bartholomew's property is whether the Church can "continue its existing charitable and religious activities in its current facilities." 914 F.2d at 356. The Second Circuit went on to hold that the second element of the *Penn Central* test—a "reasonable return"—was not applicable to any building owned for charitable purposes. 914 F.2d at 357. Thus, under the Second Circuit's interpretation of Penn Central, for-profit corporations and other commercial ventures possess greater Fifth Amendment rights than non-profit religious organizations.

In contrast to this contorted view of *Penn Central*, the New York Court of Appeals has held that an unconstitutional taking occurs whenever landmark designation of property owned by a non-profit organization "seriously interferes with the carrying out of the charitable purpose" of the organization. *Society for Ethical Culture* v. *Spatt*, 51 N.Y.2d 449, 455 (1980). This "serious interference" test must be applied to property owned by charitable organizations in order to determine whether the Landmarks Law interferes with the charitable organization's original expectations concerning the use of the property. *Penn Central*, 438 U.S. at 136.

Here, the Second Circuit gave no weight whatsoever to the substantial evidence concerning the devastating interference

of the Landmarks Law with the religious mission of St. Bartholomew's. *See* Point I, *infra*. Therefore, because the Landmarks Law as applied to St. Bartholomew's Church has seriously interfered with the religious mission of the Church, the petition for a writ of certiorari should be granted and the decision of the Second Circuit should be reversed and judgment be entered in favor of the Church on its Fifth Amendment claim.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that the petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: February 1, 1991

Respectfully submitted,

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EXHIBIT A

The New York State Interfaith Commission on Landmarking of Religious Property (the "Interfaith Commission") is a multidenominational group organized in 1980 to assess the impact of landmark preservation laws on religious institutions. The Interfaith Commission's member organizations include the New York Board of Rabbis, the New York State Catholic Conference, the new York State Council of Churches, the Council of Churches of the City of New York and the Queens Federation of Churches.

The Council of Churches of the City of New York, Inc. is an ecumenical coalition of the major religious organizations representing twelve Protestant and Orthodox denominations with approximately 1,000 congregations in the City of New York. Founded in 1968, the Council continues the work of the former Protestant Council of the City of New York.

The Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 260 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

The New York State Council of Churches in an ecumenical organization whose members include thirty-seven Judicatories from the following Churches: African Methodist Episcopal Church; African Methodist Episcopal Church, Zion; American Baptist Churches; Christian Church (Disciples of Christ): Empire Baptist Convention; Episcopal Church; Evangelical Lutheran Church in America; Moravian Church in America; Three Orthodox Communions; Presbyterian Church, U.S.A.; Reformed Church in America; Religious Society of Friends; United Church of Christ; and The United Methodist Church. The Council has cooperative relationships with the Roman Catholic Church and Jewish Communities and collegial rela-

tionships with twenty-one staffed local metropolitan, ecumenical and inter-religious councils in New York State.

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty two religious bodies having over 40 million constituents in the United States. Its public positions are based on policies adopted by its Governing Board, composed of about 250 members selected by the member denominations in proportion to their size and support of the Council.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges, and universities, as well some 50,000 churches from 74 denominations. The Association serves a constituency of 15 million people.

The Board of Rabbis, the largest Rabbinic organization in the world, with a membership comprised of Orthodox, Conservative and Reform Rabbis, is dedicated to social progress and religious freedom. The New York Board of Rabbis is a principal expositor of the views of the Rabbinate of the New York Metropolitan area as well as the Rabbinate of the State of New York.

The Christian Church (Disciples of Christ) is a Protestant denomination composed of 1.1 million members in 4200 congregations in the United States and Canada which conducts mission, ministry and service projects in many countries. The Division of Homeland Ministries is the unit within the Christian Church (Disciples of Christ) primarily responsible for developing church programs in the United States and Canada. The Department of Church in Society, with the Division of Homeland Ministries, is primarily responsible for education and action programs in areas of social justice. Those areas include the safeguarding of religious liberties and the relations between church and state.

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. Americans United has approximately 50,000 individual members of various religious

beliefs, and some of no religious belief, plus 4,000 cooperating religious organizations in all states in the United States. Americans United is involved in extensive litigation of First Amendment Establishment Clause issues throughout the United States. Since 1947, it has been involved in a large portion of Establishment Clause cases coming before the Supreme Court, including such noteworthy cases as: *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); and *School District of City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985).

The Reformed Church in America, a continuation in the United States of the Dutch Reformed Church, ministers to a membership in excess of 400,000 people of different ethnic and racial backgrounds, located throughout the United States in almost 1,000 church communities.

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly of the Presbyterian Church has not reviewed the content of this brief, nor does the amicus assert that the brief is harmonious in all its parts with the views and doctrines of the Presbyterian Church (U.S.A.). The brief is consistent with the policies adopted by the General Assembly regarding the Free Exercise Clause of the First Amendment and the landmark status of church property. The 200th General Assembly of the Presbyterian Church (U.S.A.) squarely addressed this issue in 1988:

> Churches have a right of autonomy protected by the Free Exercise Clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention.
>
> . . . .

> The government may not require a congregation to maintain a church structure because of its historical significance or subject it to proceedings in eminent domain in order to preserve a church structure. The church should make every effort to cooperate with efforts to preserve esthetic and architectural character but must finally itself by the judge of what religioius life and mission require concerning property and its use.

God Alone Is Lord Of The Conscience, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.), pp. 16-17.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.